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IN THE

Supreme Court of the United States

October Term, 1960.

No. 528

COUNTY OF LAWRENCE, CITY OF NEW CASTLE, CITY OF NEW CASTLE SCHOOL DISTRICT, COUNTY OF LAWRENCE INSTITUTION DISTRICT,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States Court of Appeals for the Third Circuit.

JURISDICTIONAL STATEMENT.

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Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JURISDICTIONAL STATEMENT.

This proceeding began with a suit by the United States, appellee, to declare void taxes levied on real property by appellants in the amount of $116,900. The United States District Court sustained the taxes, the United States Court of Appeals for the Third Circuit reversed and this appeal was taken.

This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is involved.

(a) OPINIONS BELOW.

The opinion by the United States Court of Appeals for the Third Circuit is found at 280 F. 2d 462 and a copy is attached hereto in Appendix A.

The opinion by the United States District Court for the Western District of Pennsylvania is found at 173 F. Supp. 307 and a copy is attached hereto in Appendix A.

(b) JURISDICTION.

(i) This suit to have certain local taxes on real estate declared void was begun by the United States of America, plaintiff (appellee here) invoking jurisdiction of the District Court under C. 646, 62 Stat. 933 (28 U. S. C. 1345) which provides for such jurisdiction where the United States is plaintiff.

(ii) The judgment of the United States Court of Appeals for the Third Circuit was filed [redacted] 1, 1960.

Notice of Appeal was filed in [redacted] Court September 16, 1960.

(iii) Jurisdiction of the Supreme Court to review the judgment of the Circuit Court by direct appeal is conferred by C. 646, 62 Stat. 928 (28 U. S. C. 1254(2)) which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court. . . . :
>
> • • •
>
> "(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the

review on appeal shall be restricted to the Federal questions presented."

Time within which to take such appeal is governed by C. 646, 62 Stat. 961 (28 U. S. C. 2101(c)) and is set at 90 days.

(iv) The following decisions sustain the jurisdiction of the Supreme Court to review said judgment on direct appeal in this case:

1. *City of Detroit v. Murray Corporation and United States of America*, 355 U. S. 489, 2 L. Ed. 2nd 441 (1958).

In that case, the Sixth Circuit Court held local taxes void as assessed in part on the value of materials to which the United States held title. The taxing bodies (a city and a county) both appealed and petitioned for certiorari. The Supreme Court held, quite succinctly, "The Appeal was proper."

2. *Watson v. Employees Liability Assurance Corporation*, 348 U. S. 66, 99 L. Ed. 74.

The District Court dismissed the case holding two Louisiana statutory provisions unconstitutional as to insurance policies written and delivered outside Louisiana. The Circuit Court affirmed. Plaintiff both appealed and petitioned for certiorari. The Supreme Court noted the right to appeal at p. 70, U. S. (p. 80 L. Ed.):

"Provisions of Louisiana's statutes having been held invalid as repugnant to the Federal Constitution, the case is properly here on appeal."

(v) The relevant provisions of Pennsylvania's Constitution are as follows:

"Section 1.

"All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority

levying the tax, and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, institutions of purely public charity, and real and personal property owned, occupied, and used by any branch, post, or camp of honorably discharged soldiers, sailors, and marines."

"Sec. 1B.

"Taxation laws may grant exemptions or rebates to residents, or estates of residents, of other States which grant similar exemptions or rebates to residents, or estates of residents, of Pennsylvania."

"Sec. 2.

"All laws exempting property from taxation, other than the property above enumerated, shall be void."

(Article IX)

Statutes of the Commonwealth of Pennsylvania authorizing the taxes here in question and ordinances and resolutions of the taxing bodies levying such taxes are set forth in Appendix B attached hereto. Citations thereto are set forth below.

City of New Castle (a Third Class City)

Act of June 23, 1931, P. L. 932 Sec. 2504, 53 Purdon's Statutes 37504;

Act of June 23, 1931, P. L. 932 Sec. 2531, 53 Purdon's Statutes 37531;

City of New Castle Ordinance No. 5418, Book No. 20, Page 343.

School District of the City of New Castle (a Second Class School District)

Act of March 10, 1949, P. L. 30, 24 Purdon's Statutes 672;

Resolution of School District of the City of New Castle, dated April 13, 1954.

County of Lawrence and County of Lawrence Institution District

Act of May 21, 1943, P. L. 571, 72 Purdon's Statutes 5453;

Minutes Board of Commissioners of Lawrence County;

Resolution No. 1320 Aug. 27, 1953, Vol. 25, P. 222;

Resolution No. 1393 Feb. 25, 1954, Vol. 25, P. 279;

Resolution No. 1394 Feb. 25, 1954, Vol. 25, P. 279.

(c) QUESTION PRESENTED.

Whether the Federal Government may cause to be declared invalid, as repugnant to its Constitution, local taxes imposed under general laws, applicable uniformly to all property within the taxing authority, when levied on a manufacturing plant which was then owned by such Government, then declared surplus to its needs, then leased and occupied by a corporation for the purpose of performing contracts with private persons for profit and later sold to another business corporation prior to payment of the disputed tax?

(d) STATEMENT OF THE CASE.

A defense plant (Plancor 765) was built by the Federal Government on certain land in the City of New Castle, Pennsylvania. By Federal statute, the property was subject to local taxes as property of the Reconstruction Finance Corporation (R. F. C.).

In 1947, Plancor 765 was declared surplus to its needs by the R. F. C. and custody of this surplus property was

taken first by the War Assets Administration and then by the General Services Administration.

In 1953, the R. F. C. transferred title to the property to the United States and in 1956 the latter sold it to Mesta Machine Company.

Throughout this period the property was leased to United Engineering and Foundry Company, a private corporation operated for profit.

For all years prior to 1954 the tenant, United Engineering and Foundry Company, was required by its lease to pay and did pay local taxes.

In order to escape local taxation, the General Services Administration caused the transfer of title to the United States during 1953 and amended the lease to require the tenant to pay as additional rent to the United States the amount which it formerly had paid as local taxes. The amended lease also provided that if the premises became subject to local taxes that the tenant should pay such taxes and the rent would be reduced accordingly.

The County of Lawrence, City of New Castle, City of New Castle School District and County of Lawrence Institution District, governmental bodies and arms of the state government of the Commonwealth of Pennsylvania, levied taxes for the year 1954 in the aggregate amount of $116,900. The tenant failed to pay such taxes. The United States then brought this action to have the local taxes assessed for 1954 and later years declared void.

On August 12, 1955, Congress enacted legislation providing for the payment, in lieu of taxes, to the appropriate taxing authorities, of

> "an amount equal to the amount of real property tax which would be payable to each such state or local taxing authority on such date if legal title to such real property has been held by a private citizen on such date and during all periods to which such date relates."
>
> (C. 874, Sec. 3, 69 Stat. 722, 40 U. S. C. A. Sec. 523)

Payments for 1955 and 1956 taxes have been made pursuant to the above Act.

The District Court for the Western District of Pennsylvania dismissed the complaint thus sustaining the validity of the taxes. The United States Court of Appeals for the Third Circuit reversed, saying

> "Here the tax is levied directly on the property of the United States and that property is subjected to a lien. It is patent that what was levied was nothing 'other than the old and widely used ad valorem general property tax' and as such it was invalid. United States v. Allegheny County, 332 U. S. 174 (1944).
>
> "The appellees have not brought themselves outside the established doctrine that federal property is immune from local taxation regardless of the use to which it may be put. McCulloch v. Maryland, 4 Wheat. 316 (1819); United States v. Allegheny County, supra; Board of County Commissioners of Sedgwick County v. United States, supra; Rohr Aircraft v. San Diego County, supra."

(f) THE QUESTION IS SUBSTANTIAL.

The question presented is whether the constitutional doctrine of intergovernmental immunity from tax should extend to real property to which the United States holds legal title without any inquiry into the use to which the property is put.

In the brief for the United States filed in the Circuit Court, the issue is flatly stated as follows:

> "The paramount issue presented herein is whether the cloak of sovereign immunity served to place Plancor 765 beyond the pale of the local taxing authorities. It has long been well-established that federal property is immune from local taxation *regardless of use to which it may be put.*"
>
> (Appellant's Brief, P. 4, Emphasis Added)

The Circuit Court took this view of the case and held as quoted under (d) above.

This holding of the Circuit Court is out of line with the steady progression by the Supreme Court away from the extreme doctrine of absolute immunity from tax. This stand was well summarized by Mr. Justice Jackson in *United States v. County of Allegheny*, 322 U. S. 174, 1944, 88 L. Ed. 1209 at P. 186.

> ". . . Benefits which a contractor receives from dealings with the Government are subject to state income taxation.[5] Salaries received from it may be taxed.[6] The fact that materials are destined to be furnished to the Government does not exempt them from sales taxes imposed on the contractor's vendor."[7]

"5 (James v. Dravo Contracting Co., 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 ALR 318.)

6 (Graves v. New York, 306 U. S. 466, 83 L. ed. 927, 59 S. Ct. 595, 120 ALR 1466.)

7 (Alabama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 ALR 615.)"

The latest cases are the so-called *Michigan* cases all found in Volume 355, United States Reports (2 Lawyers' Edition). In those cases, the Michigan statute imposed a tax on private lessees and users of tax exempt property who used such property in business conducted for profit. The taxes were sustained by the Supreme Court in all three cases.

See *United States (Borg-Warner Corporation) v. Detroit*, 355 U. S. 466, 2 L. Ed. 2nd 424, 78 S. Ct. 474, 1958;

United States (Continental Motors Corporation) v. Township of Muskegon, 355 U. S. 484, 2 L. Ed. 2nd 436, 78 S. Ct. 483, 1958;

City of Detroit v. Murray Corporation of America, 355 U. S. 489, 2 L. Ed. 2nd 441, 78 S. Ct. 458, 1958.

It is true that Pennsylvania has not enacted a statute imposing taxes on the lessees of exempt property, doubtless because such lessees have always been taxed under Pennsylvania constitutional doctrine which holds that public property is not exempt unless used for *public purposes*. (Article IX, Section 1, Pennsylvania Constitution).

Had Plancor 765 been owned by any public body within Pennsylvania, and used as it was by United Engineering and Foundry Company for profit, it would have been subject to the taxes here in question.

Thus these taxes are completely non-discriminatory and are valid even on publicly owned property under Pennsylvania's Constitutional doctrine. This aspect of the case was overlooked by the Circuit Court.

We urge upon the Court that there are two important aspects of the doctrine of intergovernmental immunity from tax which should be given thorough consideration in this case.

One is the proposition that Pennsylvania, which taxes lessees of exempt property not used for public purposes, should not be in a worse position with respect to federal property than those states, such as Michigan, which have passed sophisticated statutes having the same effect.

The second is that the doctrine of absolute immunity of federal property from local tax is *not* the holding of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579 (1819), where Chief Justice Marshall said:

> ". . . that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.
>
> "We are unanimously of the opinion that the law passed by the legislature of Maryland, imposing a tax

on the Bank of the United States, is unconstitutional and void.

"This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional." (From the Opinion, p. 436.)

We contend that the correct interpretation of that opinion would validate the taxes imposed in this case which were imposed in common on all other real property within the taxing districts and would have been imposed on Plancor 765, as used in the taxable year, had it been owned by Pennsylvania itself, by a church, a charity, or one of the appellant taxing authorities.

It is our contention, which we would like to develop more fully in brief and oral argument, that the non-discriminatory taxes here involved are valid. They place no burden upon the federal government, except such as it deliberately assumed by amending the lease for 1954 in a disingenuous maneuver to deprive appellant municipalities of tax.

In summary then, we contend that the taxes here imposed are equally valid as those imposed in the *Michigan* cases, *supra*, and additionally and alternatively, that these taxes are valid within the holding of *McCulloch v. Maryland*, *supra*.

We submit that the federal question is of great and continuing public importance and that any case which chal-

lenges the commonly accepted belief as to the meaning of *McCulloch v. Maryland*, *supra*, presents a substantial question.

Respectfully submitted,

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APPENDIX A.

Opinion of Court of Appeals.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued March 10, 1960

Before GOODRICH, STALEY and FORMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed July 1, 1960)

By FORMAN, *Circuit Judge*.

This is an appeal from an order of the United States District Court for the Western District of Pennsylvania[1] dismissing the complaint of the appellant, the United States, in which it sought to have declared void certain tax liens for the year 1954 in the aggregate amount of $116,900 imposed by the appellees, County of Lawrence, City of New Castle, City of New Castle School District and County of Lawrence Institution District, governmental bodies and arms of the state government of the Commonwealth of Pennsylvania.

Briefly the pertinent facts which were agreed upon by the parties are as follows:

In 1942, the City of New Castle, in the County of Lawrence, Pennsylvania, conveyed certain parcels of its land to the Defense Plant Corporation, a subsidiary of the Reconstruction Finance Corporation. A defense plant was constructed thereon known as Plancor 765 at a cost of approximately $23,000,000. United Engineering and Foundry Company operated it under a series of leases from 1943 to

1. The opinion of the United States District Court is found in in 173 F. Supp. 307 (1959).

1956. The Reconstruction Finance Corporation as successor to the Defense Plant Corporation declared Plancor 765 surplus to its needs under the Surplus Property Act of October 3, 1944,[2] and on September 4, 1947, the War Assets Administration assumed the care, custody and accountability for the property, until it was succeeded by the General Services Administration.[3]

On June 13, 1950, the Reconstruction Finance Corporation conveyed the property to the United States of America by a quit claim deed which was recorded in Lawrence County on December 15, 1953.

On April 25, 1952, the Reconstruction Finance Corporation and the United States, acting through the Administrator of the General Services, as of January 1, 1952, leased Plancor 765 to the United Engineering and Foundry Company for a term of two years ending December 31, 1953. The lessee was required to pay all taxes,[4] assessments and similar charges which were assessed or imposed upon the lessor or the lessee during the term of the lease.[5] Several supplements to the original lease were executed during its term.

On July 13, 1954, the United States and United Engineering and Foundry Company executed an agreement as of January 1, 1954, which renewed the 1951 lease and its supplements, except as modified in the renewal. It provided for a term of one year ending December 31, 1954 and for a month to month tenancy from January 1, 1955 to

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2. 58 Stat. 765.

3. See Federal Property and Administrative Services Act of 1949, c. 288, 63 Stat. 377, 40 U. S. C. A. § 472, et seq.

4. The district court found that under a series of leases prior thereto the lessee agreed to pay local taxes and did so through December 31, 1953. The leases required a minimum rental with a profit sharing right to the lessor running from 7 to 11.6 percent of net sales.

5. Paragraph 11 of the lease contained the following provisions:

"11. Lessee agrees to pay to the proper authority, when and as the same becomes due and payable, all taxes, assessments and similar charges which at any time during the term of this lease

June 30, 1955. By its terms the lessee was no longer required to pay local taxes but rather was required to pay their equivalent as additional rent:[6]

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may be taxed, assessed or imposed upon the Lessor or Lessee with respect to or upon the leased premises or any part thereof, or upon the occupier thereof, or upon the use or operation of the leased premises, provided, however, that such taxes, assessments or similar charges shall be prorated and apportioned as of the date of commencement and as of the effective date of expiration, termination or cancellation of this lease, respectively, but the obligation of Lessee with respect to the payment of such taxes, assessments or similar charges shall include the amount thereof properly applicable during the term of this Lease. Lessee also agrees to contract in its own name for and to pay all claims or charges for or on account of water, light, heat, power and any other service or utility furnished to or with respect to the leased premises or any part thereof.

"In the event Lessee fails to pay, when due, any taxes, assessments, utility bills or similar charges, as above set forth, then Lessor may, at its option, pay such taxes, assessments, bills or other charges and require Lessee to immediately reimburse it for such cost, which amount is hereby declared to be additional rental and shall become immediately due and payable. Lessor reserves the right to contest the validity or amount of any tax or assessment and Lessee agrees to give Lessor notice of all taxes and assessments immediately upon receipt thereof by Lessee."

6. The pertinent provision in the 1953 renewal is contained in Paragraph VI, amending paragraph II, of the 1951 lease and reads as follows:

"II(a). In addition to any and all rentals required by this Lease, as amended, to be paid Lessee shall pay to Lessor, as additional rent, the sum of $110,008.41 for the period from January 1, 1954 to December 31, 1954, in quarterly installments of $27,502.11 in advance during the calendar year 1954, and the sum of $9,167.37 in advance for each month or part thereof the Lessee occupies the leased premises hereunder during the period January 1, 1955 to June 30, 1955.

"(b) In the event the leased premises, or any part thereof, during the lease term, becomes taxable for real estate taxes for any reason whatsoever, whether by the enactment of Federal legislation or otherwise, Lessee shall pay to the proper local authority all such taxes, assessments and/or similar charges in lieu of taxes which at any time during the lease term may be taxed, assessed or imposed upon the Lessor or Lessee with respect to or upon the leased premises or any part thereof, or upon

On August 12, 1955, Congress enacted legislation providing for the payment, in lieu of taxes, to the appropriate taxing authorities, of

> "an amount equal to the amount of real property tax which would be payable to each such state or local taxing authority on such date if legal title to such real property has been held by a private citizen on such date and during all periods to which such date relates."[7]

Payments for 1955 and 1956 taxes have been made pursuant to the above Act.

The United States had filed a preceding complaint to this suit in the United States District Court for the Western District of Pennsylvania against the same parties as are appellees here under Civil Action No. 13,667, in which it prayed to have taxes for the years 1954, 1955 and 1956 declared void. That suit was dismissed without prejudice pursuant to an opinion and order filed November 19, 1958.[8]

On July 19, 1956, and while the said suit was pending, the United States conveyed the property to Mesta Machine Company by deed, without warranty, and the purchaser executed a purchase price mortgage to secure its note in the sum of $7,500,000.

Concurrently with the delivery of the deed the General Services Administrator entered into a "side agreement" with Mesta Machine Company whereby the United States obligated itself to continue the litigation then pending to

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the occupier thereof, or upon the use or operation of the leased premises, and in such event, the additional rent provided by subparagraph (a) of this paragraph 11 shall be renegotiated so as to provide for a reduction of said additional rent in an amount (not to exceed the said additional rent) representing the actual amount of taxes, assessments and/or similar charges in lieu of taxes properly due and payable during the lease term or applicable portion thereof."

7. c. 874, § 3, 69 Stat. 722, 40 U. S. C. A. § 523.

8. The filing of the complaint in this case followed on May 13, 1957.

vacate the alleged illegal tax liens and to assume liability therefor should a judgment be entered against the United States. Following the dismissal of the pending suit this action was brought.

On the foregoing stipulated facts, among others, the district court dismissed the complaint after concluding that the case before it was distinguishable on the facts from Board of County Commissioners of Sedgwick County v. United States, 105 F. Supp. 995 (Ct. Cl. 1952); that immunity with respect to the tax on the property was waived by the Government; that it was estopped from claiming its sovereign immunity and that it had failed to show a justiciable interest in the property.[9]

The district court found that under Section 8,[10] of the Reconstruction Finance Corporation Act (47 Stat. 8, 15 U.S.C.A. § 607), the constitutional immunity to local taxation upon real property owned by the Reconstruction Finance Corporation was waived.

It further found as follows:

> ". . . Commencing as we do with taxability under the facts in this case, if it was not waived, Plancor 765 became exempt on September 4, 1947, which was the date of the acceptance of responsibility by the WAA, (Exhibit 2). But the government in this case did not choose to insist upon continued tax immunity. It directed and subjected the property to local taxation by its lessee United Engineering, from 1947 through and including 1953 and to July 13, 1954. On the merits of this controversy, then, I hold that the United States, prior to July 13, 1954, had not withdrawn its waiver of immunity from the imposition of local taxes on Plancor 765. Under Pennsylvania law, the property

9. See footnote 1, supra.

10. Section 8 (as amended): ". . . any real property of the Corporation shall be subject to . . . State, Territorial, county, municipal, or local taxation, to the same extent according to its value as other real property is taxed."

was placed on the assessment rolls for the year 1954 in the fall of 1953. 72 P.S. § 5020-401(e). All the local taxes were levied before April 13, 1954, when the tax of the school district of New Castle was levied. The government made no change in the taxability of this property from the erection of the plant until July 13, 1954. At the latter date, the government itself took over the amount of local taxes. Congress has since directed that the 1955 and 1956 taxes be paid in accordance with the statute." 173 F. Supp., at 313, 314.

In concluding that there had been a waiver of immunity the court commented:

> "On the merits the government asks that this court strike down the lien of these taxes. Under the factual situation, that does not seem fair, just or right. The government here was the owner of and renting a property declared surplus." 173 F. Supp., at 314.

Since the opinion of the district court, filed on April 19, 1959, the Supreme Court, on May 23, 1960, considered relatively the same issue in Rohr Aircraft Corporation v. County of San Diego, 28 U.S.L. Week 4331 (U. S. May 23, 1960). In that case the County of San Diego assessed ad valorem real property taxes on property against the Reconstruction Finance Corporation as owner for the fiscal years 1951 to 1955, inclusive. Pursuant to a declaration made May 29, 1946, the Reconstruction Finance Corporation had declared the subject property surplus to its needs and the War Assets Administration and the General Services Administration as its successor retained possession of it until September 1, 1949, during which period it was used as a storage depot and a sales center for surplus property. On September 1, 1949, it was rented to Rohr Aircraft's predecessor in a lease in which the lessor was described as the "Reconstruction Finance Corporation . . . and the United States of America, both acting by and through the General Services Administration under . . . the Surplus Property

Act of 1944." By the terms of the lease the lessee undertook to pay all taxes legally assessed against the property. Rohr Aircraft paid the taxes and, after claims for refund were denied, filed suit to recover the taxes. The trial court found against it and the Supreme Court of California affirmed. 51 Cal. 2d 759, 336 P. 2d 521 (1959). It took the view that real property declared to be surplus under the Surplus Act of 1944,[11] record title to which is in the Reconstruction Finance Corporation, continues to be subject to local taxation under the waiver of the exemption provided for by Section 8 of the Reconstruction Finance Act. In Continental Motors Corp. v. Township of Muskegon, 346 Mich. 141, 77 N. W. 2d 370 (1956), the Supreme Court of Michigan held similarly. To resolve the conflict engendered by the opposite conclusion of the Court of Claims in the Board of County Commissioners of Sedgwick County v. United States, supra, the Supreme Court agreed to hear the case.

The Court reviewed the history of the Reconstruction Finance Corporation, pointing out that it was originally created for the purpose of making loans to distressed business concerns. It noted that:

> ". . . Apparently Congress was concerned that property obtained by the Corporation through its financial operations in aid of economic recovery would lose its taxable status. . . ." 28 U.S.L. Week at 4332.

Hence, it reasoned, the right of state and local governments to tax property coming into the hands of the Corporation was preserved through Section 8 of the Act. Note was also taken of the widening sphere of functions of the Corporation in 1940 with the approach of World War II and the necessity for the acquisition of large tracts of land resulting in the extension of the waiver to real estate holdings of the Defense Plant Corporation. See 55 Stat. 248.

But with the passage of the War Surplus Act of 1944 the functions of the Reconstruction Finance Corporation

11. See footnote 2, supra.

with relation to such lands changed. Of this the Court commented:

> "It appears to us that the purpose of the waiver provision was to permit taxation of real property being used by the Reconstruction Finance Corporation in the performance of its functions. Such use was terminated when the property was declared surplus in 1946. At that time another agency of the Government took both the occupancy and complete control of the property for the purpose of management and disposition. The Reconstruction Finance Corporation, under the specific provisions of the Surplus Property Act, thereby lost all power and control over the property, which came into the hands of the Administrator for the account of the United States, any proceeds therefrom being ordered paid into the United States Treasury. Thereafter, the Administrator elected, as he had the statutory power to do, to lease the property to appellant's predecessor. The real property, however, remained in the account of the United States, not the Reconstruction Finance Corporation. . . . . We think that the land here was 'owned' by the United States." 28 U.S.L. Week at 4332, 4333.

The Court assayed the decision of the Supreme Court of California in this case and that of the Court of Claims in Sedgwick County, supra, and said:

> ". . . . We agree with the Court of Claims 'that the cloak of immunity descended upon the property [when it was declared surplus] and no tax liability for the property could arise thereafter.'" [105 F. Supp. 1002]. 28 U.S.L. Week, at 4333.

The facts in the Rohr case are generally the same as in the case at bar. There, too, the property was leased for a completely private purpose of the tenant, but the

waiver of immunity of the sovereign to taxation found by the district court in this case was denied.

The district court buttressed its position that immunity must be denied with the theory that the United States was equitably estopped from claiming it. Apparently the basis for that conclusion was that prior to 1954 the taxes were paid by the government itself until the first lease under the War Surplus Act and thereafter the taxes were paid by the government's lessee; and that the government, under the factual situation as found by the court, in renting the property to a private lessee, was exercising a proprietary function. That there was a prior waiver by Congress of the immunity furnishes no basis to estop the government from later claiming it. Maricopa County v. Valley Bank, 318 U. S. 357, 362 (1943). The activities involved in this case were the lawful acts of corporations and agencies created by the United States and were governmental in nature. See Federal Land Bank v. Bismark Lumber Co., 314 U. S. 95, 102 (1941); Mayo v. United States, 319 U. S. 441, 448 (1943). The taxes were paid by the government only under the express authority of the Reconstruction Finance Corporation Act. Otherwise they were paid by the lessee, induced by the government's requirements in the provisions of its leases. Evidently both the government's officials and the lessee regarded the imposition of taxes as lawful. That they were not, forms no basis for an estoppel against the government, equitable or otherwise, to claim its sovereign immunity against the local taxes. Utah Power & Light Co. v. United States, 243 U. S. 389 (1917); Automobile Club of Michigan v. Commissioner, 353 U. S. 180, 183 (1957). In view of the foregoing we find it unnecessary to discuss the failure to show here the essential factual elements to establish an equitable estoppel in any event.

It should be recalled that a quit claim deed for this property was delivered to the United States by the Reconstruction Finance Corporation on June 13, 1950 and recorded on December 15, 1953. Of this the district court commented:

". . . I hold that the execution and delivery of the quit claim deed and the recording of it made no change in the tax status of Plancor 765. . . ." 173 F. Supp., at 313.

But the Court in Rohr Aircraft remarked:

"There would be no question as to the exemption of the real property involved had the record title been in the name of the United States. . . ." 28 U.S.L. Week, at 4332.

Finally the district court concluded that the appellant's complaint must be dismissed because it conveyed the property in question to the Mesta Machine Company on July 19, 1956 without including any warranty of title in its deed. It held:

". . . That there is nothing in the complaint in the instant action nor is there any evidence in the agreed statement of facts or elsewhere that the security for the payment of the purchase money is in any way jeopardized by the so-called tax liens against Plancor 765. It is true that the government says that the 'National Security Clause' which was made a part of the deed to Mesta may be jeopardized by the tax liens. Such a possibility is so remote and incidental as not to justify this court in refusing to strike down these tax liens. See S.R.A. Inc. v. State of Minnesota, supra. Further, in the opinion of this court there is no justiciable issue between the government and these defendants. It is not a 'case or controversy' within the meaning of the constitution, Article 3, § 2, in which the jurisdiction of the United States District Court may be invoked. Moreover, defendants assert before this court and this court will presume that the defendants will abide by their assertions, that they will not subject any interest of the United States in the property to tax sale or otherwise jeopardize the government's mortgage security. . . ." 173 F. Supp., at 315.

It is clear that the United States by its "side agreement" obligated itself to continue the litigation pending at the time it sold the property and that if unsuccessful therein would assume liability for the payment of the liens or would

> "otherwise cause the liens of said taxes for the year 1954 . . . to be withdrawn, settled or otherwise expunged from the record so that there shall be no lien or purported lien for said taxes."

We do not agree with the district court. The agreement was tantamount to a warranty and the unpaid taxes for 1954 constitute a lien against the property. The United States has an interest in removing the lien in accordance with the obligation of its agreement and in view of the substantial incumbrance it retains against the property by way of its mortgage. Contrary to the district court's finding we must conclude that it had before it a justicable issue between the appellant and the appellees over which its jurisdiction had been properly invoked under 28 U. S. C. A. § 1345.

We have not overlooked the argument of the appellees that Rohr Aircraft decided only the narrow issue that property which was taxable in the hands of the Reconstruction Finance Corporation "becomes immune when custody and possession are transferred to another agency of the United States." They emphasize that the latter decision:

> ". . . says nothing on the doctrine of the Michigan cases that a state may impose a non-discriminatory tax on the lessees of Federal property and these cases are not cited in the opinion."

They contend that the instant tax is valid under the doctrine laid down in a trilogy of Michigan cases decided by the United States Supreme Court on March 3, 1958.[12]

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12. United States v. City of Detroit, 355 U. S. 466. United States v. Township of Muskegon, 355 U. S. 484. City of Detroit v. Murray Corporation, 355 U. S. 489.

However, the Michigan cases are clearly distinguishable from the present case. *In none of those cases was there a tax on the federal government or its property.* The effect of the Michigan statute authorizing the taxes therein imposed is made clear by the Court in United States v. City of Detroit, 355 U. S. 466, where it said, at page 469:

> "The Michigan statute challenged here imposes a tax on private lessees and users of tax-exempt property who use such property in a business conducted for profit. Any taxes due under the statute are the personal obligation of the private lessee or user. The owner is not liable for their payment nor is the property itself subject to any lien if they remain unpaid. So far as the United States is concerned as the owner of the exempt property used in this case it seems clear that there was no attempt to levy against its property or treasury."

Here the tax is levied directly on the property of the United States and that property is subjected to a lien. It is patent that what was levied was nothing "other than the old and wisely used ad valorem general property tax" and as such it was invalid. United States v. Allegheny County, 332 U. S. 174 (1944).

The appellees have not brought themselves outside the established doctrine that federal property is immune from local taxation regardless of the use to which it may be put. McCulloch v. Maryland, 4 Wheat. 316 (1819); United States v. Allegheny County, supra; Board of County Commissioners of Sedgwick County v. United States, supra; Rohr Aircraft v. San Diego County, supra.

The vigor with which the appellees seek to sustain the taxes in this case, and the sympathetic view of the trial judge are understandable in the light of the hardship wrought upon local authorities when they are confronted with tax immune ratables which would otherwise share the mounting costs of their governmental service. However,

alleviation of the hardship for the year 1954 could only come by way of legislative grant. That there is absent any intent upon the part of Congress to make relief available prior to the 1955 statute (40 U. S. C. A. §§ 521-524) is made clear by the concluding passages of the opinion of the Supreme Court in Rohr Aircraft, supra, 28 U. S. L. Week, at page 4333.

Accordingly the order of the district court of April 17, 1959, dismissing the complaint and civil action is reversed and judgment will be entered in favor of the United States.

Opinion of District Court.

WILLSON, District Judge, April 17, 1959.—In this case, the United States prays that this court declare certain taxes levied against real property owned by the Mesta Machine Company to be null and void. Pursuant to state law, defendants, that is, the County of Lawrence, City of New Castle, City of New Castle School District and the County of Lawrence Institution District, all of Pennsylvania, in this judicial district, levied 1954 real property taxes against property situate in New Castle, formerly owned by Defense Plant Corporation. Unless the real property in question is immune from local taxation, the taxes assessed and levied in the sum of $116,899.40 are liens against the property.

The case is presented on a written agreed statement of facts which are separately filed so that it is unnecessary in this opinion to set forth in detail all of the evidentiary facts.

In August, 1942, the City of New Castle conveyed the property here involved to Defense Plant Corporation for a nominal consideration. The grantee in the deed is recited as a corporation created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act. Under this act, 15 U. S. C. A. 607, real property of RFC is subject to local taxation to the same extent according to its value as other real property is taxed. Defense Plant Corporation erected thereon Plancor 765 and leased the same to United Engineering and Foundry Company which operated it until the property was sold to Mesta Machine Company on July 19, 1956. The manufacturing plant erected on the property cost the government some twenty-three million dollars. During the war United Engineering manufactured defense material for the government, as well as other material for private consumption. After the war, United Engineering leased the property from the Reconstruction Finance Corporation, and carried on a private manufacturing operation for its own profit. It had the full beneficial interest in the property.

Under a series of leases United Engineering agreed to pay local taxes on the property and did so through December 31, 1953. The leases required a minimum rental payment of $300,000 per annum with a profit-sharing right to the lessor running from 7 percent to as much as 11.6 percent of net sales.

At the outset, this court, of course, recognizes the decisions and principles in a long series of cases commencing with M'Culloch v. Maryland, 4 Wheat. 316, and including Van Brocklin v. Tennessee, 117 U. S. 151, and the last of which are the three decisions found in 355 United States Reports, the first of which is United States v. City of Detroit, 355 U. S. 466, and the others at pages 484 and 489.

The recent decisions are not too helpful on the precise point at issue in the instant case, because the Michigan local taxes were assessed and levied under specific state statutes authorizing the local governments to tax the privilege to use and to occupy property otherwise exempt. It should be noticed, too, that United States v. Allegheny County, 322 U. S. 174, is not too helpful in deciding the instant case, because the court ruled invalid a tax which the state did not contend was "anything other than the old and widely used ad valorem general property tax. * * *" As the Supreme Court of Pennsylvania said in Homestead Boro. v. Defense Plant Corp., 356 Pa. 500, it is, of course, fundamental that a sovereign may not be taxed without its consent, but, as that court said, when property has been laid open by the sovereign to local taxation, then the constitutional immunity is no longer applicable.

In the instant case, we commence the study of the facts on the basis that Congress did subject Plancor 765 to local taxation and that local taxes were paid by United Engineering until the year in question, 1954, because plaintiff, acting by heads of various owning agencies required that the United Engineering & Foundry Corporation pay the local taxes. In a prior civil action before me, 165 F. Supp. 1, the 1955 and 1956 taxes were finally excluded because of the passage of Public Law 388, 40 U. S. C. A. 523, which became

effective January 1, 1955. In the declaration of policy of that Act, Section 701, it is stated:

> "The Congress recognizes that the transfer of real property having a taxable status from the Reconstruction Finance Corporation or any of its subsidiaries to another Government department has often operated to remove such property from the tax rolls of States and local taxing authorities, thereby creating an undue and unexpected burden upon such States and local taxing authorities, and causing disruption of their operations. It is the purpose of this title to furnish temporary measures of relief for such States and local taxing authorities by providing that payments in lieu of taxes shall be made with respect to real property so transferred on or after January 1, 1946."

In House Report No. 1453, submitted July 25, 1955, the Committee on Government Operations indicated the reasons why the enactment of the statute was desirable. The report, found in United States Congressional Code and Administrative Notes, Volume 2, Eighty-fourth Congress, page 3114, recites that Congress specifically made the real property of the Reconstruction Finance Corporation and its subsidiaries subject to state and local taxation to the same extent according to its value as other real property is taxed. The legislative history goes on to say:

> "* * * Because of a ruling by the United States Court of Claims in 1952, and a subsequent ruling by the Comptroller General in the same year, certain real properties that had formerly been subject to local taxation have now been rendered nontaxable by the local authorities. This is true whether complete legal title to real property has been transferred from a Government corporation to another Government department, or whether the Government corporation retains legal title and transfers custody, control, or accountability for the real property to another Government department. Thus, the real property which has been

on the State and local tax rolls by specific provisions of an act of Congress has been taken off such tax rolls by a transfer to another Government department without any break in the chain of title being held by the United States. In the view of your committee this has resulted in the imposition of an unjustifiable financial burden upon communities. The nature and use of the commercial or industrial facilities involved has not changed. The Congress has already provided that these properties should be taxed when they are held by and under the exclusive control of the Reconstruction Finance Corporation. It, therefore, appeared just and necessary that provisions be made, as in this bill, at least on a temporary basis, to make payments in lieu of taxes until a comprehensive policy with regard to payments in lieu of taxes shall have been enacted by the Congress."

The Committee report refers to the Court of Claims case, Board of County Com'rs. of Sedgwick County, Kans. v. United States, 105 F. Supp. 995, and a subsequent ruling by the Comptroller General. Plancor 765, New Castle, Pennsylvania, is the government designation for this property which is one of the properties referred to in the committee report.

Congress having waived the immunity of this particular property from local taxation, the point to be decided is whether that immunity continued to and including the year 1954. As the Sedgwick County case is the foundation of the rulings of the Administrator of General Services and of the Comptroller General as well as the basis for the government's argument in the instant case, it is appropriate to quote three paragraphs from the opinion in that case. Commencing at page 1001, the court says:

"We believe, however, that the taxes for the year 1947 fall into a different category, as a result of the declaration of the property as surplus, and the acceptance thereof by the WAA on April 16, 1947, acting

presumably under the authority conferred in section 11(d) of the Surplus Property Act.

"The law did not require that the RFC execute a deed of the property upon its transfer to the control of the WAA, and the RFC continued after April 16, 1947, as the 'owning agency' within the meaning of the Surplus Property Act—apparently as a matter of convenience to the Government and to minimize actual paper work and expense until the WAA made final disposition of the property. While a bare legal title for the use of the United States may have thus remained in the RFC from April 16, 1947, until February 25, 1948, when the property was transferred to the Department of the Air Force, nevertheless the entire responsibility for the care and handling, and disposition of the property was in the WAA during that period. United States v. Shofner Iron & Steel Works, 9 Cir., 168 F. 2d 286, 287.

"The waiver of constitutional immunity from taxes of 'real property of the corporation' enacted with respect to the RFC in 1932, 47 Stat. 10, was undoubtedly intended to apply to that real property of the corporation held by it in the performance of the duties and responsibilities imposed upon it by law. But by the August 21, 1946, declaration of the property as surplus under the Surplus Property Act, 58 Stat. 765, enacted some 12 years after 47 Stat. 10, the RFC declared that the property was surplus to its 'needs and responsibilities', and by the acceptance of April 16, 1947, was divested of all control and responsibility. At no time after the acceptance by the WAA on April 16, 1947, did the RFC or any of its employees have physical possession, control, or custody of the property. It had neither the use nor the right to use the property. It could not even withdraw the declaration of surplus property without the approval of the War Assets Administrator. 32 CFR, 1946 Supp. 8301.15(b)."

The following is a brief comparison of the facts and issues in the instant case and the facts in the Sedgwick County case:

U. S. v. County of Lawrence District Court	Sedgwick v. U. S. Court of Claims 105 F. Supp. 995
I. Complaint — Government seeks to strike off local tax lien on non-government property	I. Complaint — County sought money judgment against United States for tax assessed against realty for the years 1944, '45, '46 and '47
II. Facts:	II. Facts:
1. August, '42—deed to Defense Plant Corp.	1. 1942 — deed to Defense Plant Corp.
a. Realty/plant—subject to tax, 15 U. S. C. A. 607 Lease to United Engineering & Foundry Co.—United to pay tax direct	a. Realty/plant—subject to tax, 15 U. S. C. A. 607 Lease to Boeing—no provision for it to pay tax
2. July, 1945—Defense Plant Corp. liquidated—to RFC	2. July, 1945—Defense Plant Corp. liquidated—to RFC
a. Realty/plant — taxable, 15 U. S. C. A. 607 Lease to United—United obligated to pay local tax	a. Realty/plant—taxable 15 U. S. C. A. 607 Lease to Boeing—no provision for it to pay local tax; it did not pay tax
3. September 4, 1947 Acknowledgment of transfer of accountability from RFC to WAA	3. April, 1947 RFC owner
a. Under Sedgwick case non-taxable, but lease from RFC required United Engineering to pay taxes which it did pay	a. Authority and responsibility in WAA, and RFC *neither physical possession/control/custody/nor the right to use the premises*
4. June 13, 1950 Unrecorded deed RFC to United States	4. February, 1948 RFC to United States
a. Sedgwick holds such a deed unnecessary	a. Deed by WAA for RFC

U. S. v. County of Lawrence District Court	Sedgwick v. U. S. Court of Claims 105 F. Supp. 995
II. Facts:	II. Facts:
b. Taxes levied against realty. Lease to United Engineering requiring it to and it did pay local taxes	b. Deed was subject to taxes of '44 to '47
	c. Custody of property turned over to Air Force
5. April 25, 1952	1. Tax assessment of the county made under statutory provision allowing such tax (In the instant case, the statute is 72 P. S. 5020.201)
a. Renewal lease by RFC as lessor, to United Engineering for a period of two years, to commence 1-1-51, ending December 31, 1953	
b. United Engineering as lessee required to and did pay taxes for '51 and '52	
6. December 13, 1953 Quit claim deed from RFC to U. S. recorded in Lawrence County	
7. July 13, 1954 U. S. by Administrator of GSA leases to United Engineering for year 1954 commencing January 1. For the first time requirement that lessee pay local taxes is deleted. Instead an amount equal to local taxes is added as additional rent payable to the United States.	2. No sums were paid in lieu of taxes on this property

It is noticed here that the Reconstruction Finance Act waiving tax immunity on real property owned by it is not a wartime statute. It was passed in 1932. This particular property was handled by the various government owning agencies in exactly the same manner from the erection of the plant in 1942 until it was sold to Mesta Machine Com-

pany in July, 1956, except for the deletion of the requirement in the contract executed July 13, 1954, that the lessee, United Engineering, pay the local taxes. There is nothing shown by the evidence in this record that the Surplus Property Administrator under the Surplus Property Act of 1954, after the property was declared surplus on September 4, 1947, actually assumed the care and handling of the plant. The real property continued in the possession of United Engineering under renewals of the original lease of 1942. The Surplus Property Administrator at no time executed a renewal lease. When the Surplus Property Act of 1944 was superseded by Chapter 10 of the Management and Disposal of Government Property Act, 40 U. S. C. A. 471, enacted June 30, 1949, Plancor 765 went under the Administrator of General Services. The RFC and GSA acting for the United States executed a renewal lease on April 25, 1952, effective January 1, 1951 for a period of two years. This lease recited the original lease of April 15, 1942, and the series of leases thereafter and required United Engineering to pay the local taxes assessed and levied against the property for the years 1951 and 1952. For the year 1953, United Engineering was in possession under several supplements to the last-mentioned lease. As required, United Engineering did pay the local taxes to December 31, 1953. It continued in possession, but on July 13, 1954, plaintiff and United Engineering executed a lease renewal effective back to January 1, 1954, which renewed the 1951 lease and the supplements thereto (Exhibit 5). In this agreement for the first time the lessee was relieved of the obligation to pay local taxes against the real property. It is noticed at this point that the quit claim deed from RFC to the United States, dated June 13, 1950, was not placed on record in the Recorder's office of Lawrence County until December 15, 1953.

Pursuant to the renewal lease on July 13, 1954, United Engineering paid to the government $110,008.41, in additional rental in lieu of the local taxes which it had theretofore paid defendants. The sum paid is substantially the

amount of local taxes levied by defendants for the year 1954. All of these taxes had been levied prior to the deletion from the lease made in the middle of the year, which relieved the lessee from the payment of local taxes. The government is frank to say that the July 13, 1954 agreement prevented United Engineering from receiving a windfall because of the Sedgwick County decision, the reason being mentioned in the letter of the Acting Comptroller General of October 11, 1954, set forth in paragraph 4 of the statement of facts. That decision, says the government, and the general law that real property of the United States is immune from taxation, requires this court to set aside the tax liens involved in this civil action.

But it seems to this court that there is no clearcut point in the instant case where tax liability ends and tax immunity commences. There was in the Sedgwick County case. For instance, the court says in Sedgwick, page 1001:

> "* * * At no time after the acceptance by the WAA on April 16, 1947, did the RFC or any of its employees have physical possession, control, or custody of the property. It had neither the use nor the right to use the property. It could not even withdraw the declaration of surplus property without the approval of the War Assets Administrator. 32 CFR, 1946 Supp. 8301.15 (b)."

In the instant case, as in the Sedgwick case, the factual situation may have been such that the property after 1950 at least became taxable, but if so, the heads of the administrative agencies did not undertake to act in accordance with the principles in the Sedgwick County decision, even after it was announced on July 15, 1952. I hold that the execution and delivery of the quit claim deed and the recording of it made no change in the tax status of Plancor 765. The Surplus Property Act and the Act setting up the General Services Administration, 40 U. S. C. A. 471, made a deed super-

fluous. If any authority is needed for the foregoing, the Sedgwick case is the authority. It is clear from many authorities that the sovereign may waive its tax immunity. Commencing as we do with taxability under the facts in this case, if it was not waived, Plancor 765 became exempt on September 4, 1947, which was the date of the acceptance of responsibility by the WAA (Exhibit 2). But the government in this case did not choose to insist upon continued tax immunity. It directed and subjected the property to local taxation by its lessee United Engineering, from 1947 through and including 1953 and to July 13, 1954. On the merits of this controversy, then, I hold that the United States, prior to July 13, 1954, had not withdrawn its waiver of immunity from the imposition of local taxes on Plancor 765. Under Pennsylvania law, the property was placed on the assessment rolls for the year 1954 in the fall of 1953. 72 P. S. 5020-401(c). All the local taxes were levied before April 13, 1954, when the tax of the school district of New Castle was levied. The government made no change in the taxability of this property from the erection of the plant until July 13, 1954. At the latter date, the government itself took over the amount of the local taxes. Congress has since directed that the 1955 and 1956 taxes be paid in accordance with the statute.

It seems appropriate to quote here from a decision of the Supreme Court, S. R. A., Inc. v. Minnesota, 327 U. S. 558, at 561, where the court says:

> "The supremacy of the Federal Government in our Union forbids the acknowledgment of the power of any State to tax property of the United States against its will. Under an implied constitutional immunity, its property and operations must be exempt from state control in tax, as in other matters. [Citing cases] This postulate, as a matter of federal law, forces final decision of the validity of claimed exemptions under this immunity upon this Court. [Citing cases]. The

impact of state taxation on federal operations may be so close and threatening as to compel judicial intervention to declare the state tax invalid, as in the *M'Culloch* case, or *so remote and incidental as to justify a federal court in refusing to relieve a taxpayer from a state tax. Alabama v. King & Boozer*, 314 U. S. 1. *The line of taxability is somewhat irregular and has varied through the years.*" (Emphasis supplied)

On the merits the government asks that this court strike down the lien of these taxes. Under the factual situation, that does not seem fair, just or right. The government here was the owner of and renting a property declared surplus. Further, it seems to this court that the government, under the factual situation presented, was exercising a proprietary function. It appears inequitable to permit the government to impose, in the words of Congressional House Report 1453, an "unjustifiable financial burden upon communities" by striking off tax levies which the government directed its lessee to pay, when under state law, according to defendants, 72 P. S. 5511.18, the lessee is liable for defendant's taxes. However, I do not decide that question.

The situation here is perhaps not that of a classical estoppel but certainly one giving rise to equitable estoppel. The principle is stated in 31 C. J. S. Section 138, as follows:

> "An equitable estoppel ordinarily may not be invoked against a government or public agency functioning in its governmental capacity; but where the elements of an estoppel are present it may be asserted against the government when acting in its proprietary capacity."

And further:

> "* * * As is sometimes stated, an equitable estoppel may be invoked against the United States, * * * in respect of acts done in its proprietary or private ca

pacity, as distinguished fr[illegible] its governmental or public capacity in the strict scope of which it cannot be estopped; and a failure to observe this distinction or to recognize and point out the absence of one or more of the essential elements of a perfect estoppel may be the reason for decisions and dicta which apparently deny this applicability of the doctrine of equitable estoppel, especially as against a state or the United States, for in some cases, it seems, the doctrine is less liberally applied against the United States or a state than it is against a municipal corporation."

On the merits of this controversy, this court holds that the government is not in a position to expect that this court will strike down the tax levies and liens involved in this civil action.

This court concludes that there is an additional fundamental reason why it will not grant the relief prayed for by the government: The Complaint says that the jurisdiction of the court is found on 28 U. S. C. A. 1345. This is the general section stating that district courts have original jurisdiction in all civil actions commenced by the United States or by any agency or officer thereby expressly authorized to sue by act of Congress. Defendants say that there is no authority in law or equity for this suit. On July 19, 1956, the United States deeded the property in question to the Mesta Machine Company. It gave no warranty of title. To secure the purchase price, Mesta gave the government a note for seven and one-half million dollars, secured by a mortgage on Plancor 765. Previous to the deed, the government had filed in this court Civil Action No. 13667. In the agreement to purchase, dated April 20, 1956, ahead of the deed, the government acting by the Administrator of General Services alone and not by the Attorney General, agreed to prosecute Civil Action 13667 and have the 1954 and 1955 taxes "declared invalid, void and of no legal effect." In the event the final judgment was adverse to the

government, it agreed to assume liability for the payment of taxes apportioned as of the date of delivery of the deed. Civil Action 13667 was commenced July 29, 1955 and was dismissed by me November 19, 1956.

I held in that case that there was no justiciable issue for decision as the government did not own the property and had not warranted the title. There is nothing in the complaint in the instant action nor is there any evidence in the agreed statement of facts or elsewhere that the security for the payment of the purchase money is in any way jeopardized by the so-called tax liens against Plan or 765. It is true that the government says that the "National Security Clause" which was made a part of the deed to Mesta may be jeopardized by the tax liens. Such a possibility is so remote and incidental as not to justify this court in refusing to strike down these tax liens. See S. R. A., Inc. v. Minnesota, supra. Further, in the opinion of this court there is no justiciable issue between the government and these defendants. It is not a "case or controversy" within the meaning of the constitution, in which the jurisdiction of the United States District Court may be invoked. Moreover, defendants assert before this court and this court will presume that the defendants will abide by their assertion, that they will not subject any interest of the United States in the property to tax sale or otherwise jeopardize the government's mortgage security. See United States v. 68,000 Square Feet, 79 F. Supp. 438, where Judge Medina, while on the district bench, refused to strike off a tax lien absent any showing that New York City had proceeded against the property for collection of taxes. As Judge Medina said in his case, I say in this case,—absent any showing to the contrary, I shall not presume that these defendants will fail to respect their assertions.

This opinion is regarded as comprising both the findings of fact and conclusions of law pursuant to the provisions of Rule 52 of the Federal Rules of Civil Procedure.

ORDER

And Now, this 17th day of April, 1959, for the reasons stated in the foregoing opinion, the relief prayed for by the United States is denied and the complaint and civil action is dismissed.

/s/ Joseph P. Willson
United States District Judge

APPENDIX B.

Sec. 2504. Assessment of property; duties of assessors.—The assessor shall make or cause to be made, during the year one thousand nine hundred forty five, and every third year thereafter, a full, just, equal and impartial assessment of all property, taxable according to the laws of this Commonwealth for county purposes, and all matters and things within the city subject by law to taxation for city purposes, and a just and perfect list of all property exempt by law from taxation, with a just valuation of the same. But nothing hereinbefore contained shall be construed as making taxable for city purposes the classes of personal property which by law are made taxable exclusively for county purposes at the rate of four mills. With his assessment he shall return such dimension, description, or quality of each lot or parcel of land as will be sufficient to identify the same, together with the number and kind of improvements. At the next triennial assessment following the effective date of this amending act, the assessor shall if council by ordinance so directs, classify all real estate, in such city in such manner, and upon such testimony, as may be adduced before him, so as to distinguish between the buildings on land and the land exclusive of the buildings, and he shall certify to the council the aggregate valuations of all real estate subject to taxation for city purposes within each such classification. In all cases he shall value, or cause to be valued, the property at the actual value thereof. In arriving at such value the price for which any property would separately bona fide sell, or the price at which any property may bona fide actually have been sold, shall be considered, but shall not be controlling. Instead such selling price, estimated or actual, shall be subject to revision by increase or decrease to accomplish equalization with other similar property within the taxing district. It shall be the further duty of the assessor to return annually a list of all the inhabitants over twenty-one years of age.

Sec. 2531. Tax Levies.—Council may by ordinance levy and provide for the collection of the following taxes:

1. A tax for general revenue purposes on all persons and property taxable according to the laws of the Commonwealth for county purposes; the valuation of such property to be assessed as hereinbefore provided.

(Act of June 23, 1931, P. L. 932, 53 Purdon's Statutes, Secs. 37504 and 37531.)

Final Passage 12-28-53

Recorded Ord. Book No. 20, Page 343

Ordinance No. 5418

Introduced by Mr. Gibson on December 21, 1953.

Reported Back December 21, 1953.

Council Bill No. 99.

AN ORDINANCE

Levying a tax, and fixing the tax rate for all City purposes, upon the valuation of such property as has been, or may hereafter be assessed and subject to taxation for the year of 1954, according to the provisions of the Act of 1931, June 23, P. L. 932, Section 2551 as the same was amended in 1947.

Section 1. Be It Ordained and Enacted, And it is hereby ordained and enacted, by the Council of the City of New Castle, Lawrence County, Pennsylvania, That a tax be and the same is hereby levied and the rate thereof fixed upon the valuation of all property within the said City, now or hereafter legally assessed and subject to taxation for City purposes, for the fiscal year 1954, according to the provisions of the Act of 1931, June 23, P. L. 932, Section 2551 as the same was amended in 1947.

A. Such tax rate, for general revenue purposes, for the year 1954 is hereby fixed at twelve and three-quarter (12¾) mills on each dollar of said assessed valuation, which expressed in dollars and cents, is One Dollar and Twenty-Seven and One-half ($1.275) Cents on each one hundred dollars of such assessed valuation.

B. Such tax rate, for the payment of interest on bonded indebtedness, and for the payment of loans to support the government, and to make necessary improvements in the City, for the year 1954, is hereby fixed at one and one-half (1½) mills on each dollar of such assessed valuation, which expressed in dollars and cents is Fifteen ($.15) Cents on each one hundred dollars of such valuation.

SECTION 672. *Tax Levy; Limitations.*—(a) In all school districts of the second, third and fourth class, all school taxes shall be levied and assessed by the board of school directors therein, during the month of April or May each year, for the ensuing fiscal year. In school districts of the second class such tax shall not exceed twenty mills on the dollar, and in school districts of the third and fourth class shall not exceed twenty-five mills on the dollar, on the total amount of the assessed valuation of all property taxable for school purposes therein. Each school district of the second, third or fourth class may also collect a per capita tax on each resident or inhabitant of such district, over twenty-one years of age, as herein provided.

(b) Boards of school directors of school districts of the second, third, and fourth classes are hereby authorized and directed to levy annually, a tax on each dollar of the total assessment of all property assessed and certified for taxation therein, to pay the minimum salaries and increments of the teaching and supervisory staff provided for herein. Said tax shall not be invalidated or affected by reason of the fact that it may increase the total annual school tax levy of any school district beyond the millage fixed or limited by this section: Provided, That in districts of the fourth class, the tax herein authorized, together with all other school taxes levied in the district, shall not exceed thirty-five (35) mills on each dollar of the assessed valuation thereof.

(Act of March 10, 1949, P. L. 30,
24 Purdon's Statutes 672.)

RESOLUTION

Offered by Mr. Woolcock

Seconded by Mr. Byers

Date April 13, 1954

Resolved: That there is hereby levied and assessed for the fiscal year beginning the first Monday of July, 1954 (July 5, 1954) a tax of 11.5812 mills on each $1.00 being $1.15812 on each One Hundred ($100.00) dollars of the total assessment of all property assessed and certified for taxation within said School District of the City of New Castle, Penna., for the use of said District to pay the salaries of the teaching and supervisory staff of said District as provided by law; and that there is also hereby levied and assessed for the fiscal year beginning the first Monday of July, 1954 (July 5, 1954) a tax of 8.4188 mills on each $1.00 being $.84188 on each One Hundred ($100.00) dollars of the total assessment of all property assessed and certified for taxation within said School District for the use of said School District for all other purposes for which revenues are required by said District, said tax so levied being a total of twenty (20) mills on each $1.00 being $2.00 on each One Hundred ($100.00) Dollars of the total assessment of all property assessed and certified for taxation within said School District for the use of the said School District.

SEC. 201. *Subjects of Taxation Enumerated.*—The following subjects and property shall as hereinafter provided be valued and assessed and subject to taxation for all county, borough, town, township, school (except in cities), poor and county institution district purposes, at the annual rate.

(a) All real estate, to wit: houses, house trailers permanently attached to land, buildings, lands, lots of ground, and ground rents, trailer parks and parking lots, mills and manufactories of all kinds, and all other real estate not exempt by law from taxation. Machinery, tools, appliances and other equipment contained in any mill, mine, manufactory or industrial establishment shall not be considered or included as part of the real estate in determining the value of such mill, mine, manufactory or industrial establishment. Provided: That, the exclusion of such machinery, tools, appliances and other equipment in so determining the value of such, mill, mine, manufactory or industrial establishment shall be postponed and shall not become effective until such real estate is valued and assessed for taxes to be levied for the tax or fiscal years beginning on or after the first day of January, one thousand, nine hundred fifty-six.

(Act of May 21, 1943, P. L. 571,
72 Purdon's Statutes 5453.)

Meeting: August 27, 1953. (pages 222-223) Moved by Commissioner Gilmore, seconded by Commissioner Ingham, that the following Resolution be approved:

Resolution No. 1320:

"Whereas, under provisions of "The Fourth to Eighth Class County Assessment Law", as amended, the final authority to determine the assessment values of properties is vested in the Board of Assessment and Revision of Taxes and the Chief County Assessor, and

Whereas, the system of assessment heretofore known as triennial assessment as provided by former laws has been repealed by said Assessment Law, as amended, and

Whereas, for the year of 1953 the assessments made by the elected Assessors and the Chief County Assessor were approved by the Board of Assessment and Revision of Taxes, and

Whereas, the plan of making assessments with its permanent records system, as set out in the January 18, 1952, Amendment to said Assessment Law, five (5) years being allowed therefor, has not been placed in operation, and cannot be placed in operation for some months.

Now, Therefore, Be It Resolved By the Board of Assessment and Revision of Taxes, that for the year 1954 the following rules be, and hereby are adopted, to-wit:

For the assessment for the year 1954, the elected assessors be directed to return to this Board only such changes in the several properties that may have been caused by erection of new building, destruction of building existing in 1953 or some other like conditions affecting the value of the property and new occupations and that the same be returned to this Board not later than the 1st day of October 1953, and

that upon receipt of same from the duly elected assessors this Board will insert on the Office Records for the assessment for the year 1954 the assessments made for the year 1953 and such changes therein as may be reported by the elected assessors and that the elected assessors shall make no returns as to cases where no changes have been made and that the assessment for the year 1954 shall be as thus made up and be and constitute the assessment for the year 1954."

All the members present voted in the affirmative.

Meeting: February 25, 1954. (page 279)
Moved by Commissioner Gilmore and seconded by Commissioner Armond as follows:

Resolution No. 1393:

"That the 1954 Institution Budget be adopted and the millage be officially set for Institution District tax purposes for the year 1954 at two (2) mills on the dollar on the same valuation by the Lawrence County Institution District, to be used for general Institution District purposes, including the maintenance, repairs, etc. of the County Home and Out Door Relief.

Computed on the basis of $100.00 valuation, the said tax for Institution District purposes amounts to twenty cents."

All members present voted in the affirmative.

Moved by Commissioner Armond and seconded by Commissioner Gilmore as follows:

Resolution No. 1394:

"That the 1954 County Budget be adopted and the millage be officially set for County District tax purposes for the year 1954 at seven (7) mills on the dollar on all property, offices and persons within the County of Lawrence in the State of Pennsylvania, made payable by law for County rates and levies, the same to be used for general county purposes. Computed on the basis of $100.00 valuation, the said tax for County purposes amount to Seventy Cents."

All members present voted in the affirmative.

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No. 528

In the Supreme Court of the United States

OCTOBER TERM, 1960

COUNTY OF LAWRENCE, CITY OF NEW CASTLE, CITY OF NEW CASTLE SCHOOL DISTRICT, COUNTY OF LAWRENCE INSTITUTION DISTRICT, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
ROBERT S. GRISWOLD, JR.,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 528

COUNTY OF LAWRENCE, CITY OF NEW CASTLE, CITY OF NEW CASTLE SCHOOL DISTRICT, COUNTY OF LAWRENCE INSTITUTION DISTRICT, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1, of the Revised Rules of this Court, the United States, appellee, respectfully moves that the judgment of the Court of Appeals for the Third Circuit be affirmed on the ground that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

STATEMENT

This suit was instituted by the United States in the United States District Court for the Western District of Pennsylvania in May 1957 to have declared void, illegal, and of no effect certain tax liens in the amount of $116,900, imposed by local taxing authori-

ties, appellants herein, for the tax year 1954 on real property owned by the United States at the time the taxes were levied.

The case was presented on an agreed statement of facts. (App. 23a[1]) which may be briefly summarized as follows:

For some years prior to 1950, legal title to the property, an industrial manufacturing plant, was held by the Reconstruction Finance Corporation, an instrumentality of the United States. In 1950, legal title was conveyed by the Reconstruction Finance Corporation to the United States. The deed was recorded in the Lawrence County Deed Book on December 15, 1953. During the tax year 1954, and for several years prior thereto, the property had been under a series of leases to United Engineering and Foundry Company. Local real property taxes were paid by United on the plant up through the year 1953 in accordance with the terms of its leases. However, on the basis of the Court of Claims decision in *Board of County Com'rs.* v. *United States,* 123 C. Cls. 304, the 1954 lease did not include the tax payment provision. As a result, the 1954 taxes on the plant went unpaid, and the local taxing authorities imposed the liens which this suit was brought to remove.[2] On July 19, 1956, the United States conveyed the property to Mesta Machine Company, and by special

[1] The reference is to the Appendix for the United States before the Court of Appeals.

[2] Payments in lieu of taxes for the years 1955 and 1956 were specifically authorized by Congress in the Act of August 12, 1955, 69 Stat. 722, 40 U.S.C. 523.

agreement simultaneously executed the Government assumed the responsibility for the payment of the taxes should the pending suit be unsuccessful in having the liens removed.

On these facts the District Court dismissed the Government's complaint on April 17, 1959. *United States* v. *County of Lawrence*, 170 F. Supp. 307. (Appendix A, Appellants' Jurisdictional Statement, pp. 26–39.) The Government appealed and the Court of Appeals for the Third Circuit reversed and entered judgment in favor of the United States, *United States* v. *County of Lawrence*, 280 F. 2d 462, relying on this Court's decision in *Rohr Corp.* v. *San Diego County*, 362 U.S. 628, which was announced after oral argument of the instant case. (Appendix A, Appellants' Jurisdictional Statement, pp. 13–25.) From that decision, the local taxing authorities bring this appeal, pursuant to 28 U.S.C. 1254(2).

ARGUMENT

The recent decision of this Court in *Rohr Corp.* v. *San Diego County*, 362 U.S. 628, upholding the Federal Government's immunity from local taxation, was made within a framework virtually identical to the factual situation involved here. The only distinction between the two cases serves to strengthen the holding of the Court of Appeals in the instant case. In *Rohr*, record title to the realty involved had not been transferred to the United States, but had remained in the Reconstruction Finance Corporation, although full control and management of the property had been given over to another agency. While in the hands of

R.F.C., the property did not enjoy the tax immune status normally attributed to federal property, by reason of a specific statutory waiver of that immunity. On these facts, this Court held that the location of dry legal title was not determinative, and the waiver did not extend to the property after its physical transfer to another agency of the United States. In reaching this conclusion, the Court remarked (362 U.S. at p. 633):

> There would be no question as to the exemption of the real property involved had the record title been in the name of the United States.

In the case now before the Court, record legal title for the tax period involved was indisputably in the United States, and thus it becomes crystal clear that this case was correctly decided in the Court of Appeals. The difficulties that have been experienced in recent years in determining whether particular types of taxes imposed on Government contractors, lessees, etc., violated the federal immunity from taxation are irrelevant to this case. This Court has never departed from the basic holding of *Van Brocklin* v. *Tennessee*, 117 U.S. 151, that general real estate taxes may not be imposed directly upon realty the title to which is in the United States, regardless of whether or not it is making use of the property.[3] The *Rohr* case is the

[3] See, *e.g.*, *United States* v. *City of Detroit*, 355 U.S. 466, 469; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 117; *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558, 561–562; *United States* v. *Allegheny County*, 322 U.S. 174, 176–177, 186–189; *Mayo* v. *United States*, 319 U.S. 441.

most recent reaffirmation of that principle and it controls here.

CONCLUSION

For the foregoing reasons, it is clear that there is no substantial question involved and the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
ROBERT S. GRISWOLD, JR.,
Attorneys.

DECEMBER 1960.

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Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States Court of Appeals for the Third Circuit.

BRIEF OF APPELLANTS OPPOSING MOTION TO AFFIRM.

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IN THE

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BRIEF OF APPELLANTS OPPOSING MOTION TO AFFIRM.

The United States in its Motion to Affirm contends quite simply and consistently with its previous briefs that the possession of bare legal title by the United States prohibits any local tax whatsoever and that no further inquiry into the matter need be made.

> "In the case now before the Court, record legal title for the tax period involved was indisputably in the United States, and thus it becomes crystal clear that this case was correctly decided in the Court of Appeals."
>
> (Appellee's Motion to Affirm, P. 4.)

In support of this effort to ring down the iron curtain on any discussion of the uses to which the property may be put, Appellee cites two cases. Both are discussed below.

In *Rohr Corp. v. San Diego County*, 362 U. S. 628, 4 L. Ed. 2nd 1002, property owned by the Reconstruction Finance Corporation, and thus subject to local tax by express waiver of immunity, was declared surplus to the Reconstruction Finance Corporation's needs and custody transferred to the War Assets Administration. The latter leased the property to Rohr Aircraft, the lease stating that "the Department of the Air Force has determined that the use of the leased premises by the Lessee [Rohr] herein is necessary for the production of military equipment for the National Defense." Local taxes were assessed on the realty against Reconstruction Finance Corporation as record owner. The Supreme Court of California held that since the R. F. C. had not deeded the property away, it remained taxable under the express waiver. This Court (Mr. Justice Clark) reversed saying "On the merits we conclude that the property involved is not within the waiver provision of the Federal Act. . . . We believe that the appropriate test would turn on practical ownership of the property rather than the naked legal title."

The arguments and decisions in the *Rohr* case were entirely directed to the question of when the waiver of immunity terminated for R. F. C. owned property. This Court held that practical ownership, not naked legal title, should govern this question and reversed what previously had been the majority view among state courts. Since the *Rohr* decision, Appellants have raised no issue in this case that the former waiver of immunity that attached to Plancor 765 prior to 1954 continued into that year. Appellee is beating a dead issue.

The *Rohr* case decides nothing as to the two issues raised by Appellants in this case.

(1) That the doctrine of intergovernmental immunity established by *McCulloch v. Maryland* (4 Wheat. 316, 4 L. Ed. 579, 1819) permits nondiscriminatory taxation of Federal owned property performing an entirely private function, and

(2) That the Pennsylvania Constitution imposes a nondiscriminatory tax on the lessees of property from exempt owners when such property is used for private purposes and that such taxes are valid under *City of Detroit v. Murray Corporation and United States of America*, 355 U. S. 489, 2 L. Ed. 2nd 441 (1958).

How could either argument have been made in the *Rohr* case in the face of the finding by the Air Force that the use of the premises by the lessee was "necessary for the production of military equipment for the National Defense"?

It is curious that Appellee, relying as it does on naked legal title, should cite the *Rohr* case, in which this Court stated that such was not the test and in which the facts and circumstances surrounding the use and disposition of the property were carefully examined as Appellants seek to have same examined in this case.

The United States also cites *Van Brocklin v. Tennessee*, 117 U. S. 151, 29 L. Ed. 845, 6 S. Ct. 670, 1885, which does indeed appear to support the doctrine that intergovernmental immunity imposes a flat prohibition against local taxation of any sort on Federal property. Without going into detail, which should be reserved for the brief on the merits in this case, it is sufficient to say that *Van Brocklin v. Tennessee* is not in accord with more recent decisions in this Court. For example, the following is excerpted from *Graves v. New York*, 396 U. S. 466, 83 L. Ed. 927:

". . . in Helvering v. Mountain Producers Corp., 303 U. S. 376, 82 L. Ed. 907, 58 S. Ct. 623, supra, . . . It was pointed out that the implied immunity of one government and its agencies from taxation by the

other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed. See *Metcalf & Eddy v. Mitchell, supra* (269 U. S. 523, 524, 70 L. Ed. 392, 393, 46 S. Ct. 172); *James v. Dravo Contracting Co., supra* (302 U. S. 156-158, 82 L. Ed. 170, 171, 58 S. Ct. 208, 114 A. L. R. 318)."

At pp. 488-491 (Justice Frankfurter concurring):

"Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government.

"The arguments upon which *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, rested, had their roots in actuality. But they have been distorted by sterile refinements, unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in *M'Culloch v. Maryland*. Partly as a flourish in rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power to tax involves the power to destroy.' Id. at p. 431. This dictum was treated as though it

were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resulting from a doctrinaire application of the generalities uttered in the course of the opinion of *M'Culloch v. Maryland.*

"All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called 'pernicious abstractions.' The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen: 'The power to tax is not the power to destroy while this Court sits.' *Panhandle Oil Co. v. Mississippi,* 277 U. S. 218, 223, 72 L. Ed. 857, 859, 48 S. Ct. 451, 56 A. L. R. 583 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions [illegible] withdrew from the taxing power of the States [illegible] on a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount. These decisions have encountered increasing dissent. . . . In this Court dissents have gradually become majority opinions, and even before the present decision the rationale of the doctrine had been undermined."

These points were further emphasized in *Oklahoma Tax Commission v. Texas Co.,* 336 U. S. 342, 93 L. Ed. 721.

"Moreover the burdens of the taxes here, if any of a character likely to interfere with respondents in carrying out the terms of their leases, are as appropriately to be judged by 'regard . . . to substance

and direct effects,' and as inappropriately to be determined 'by merely theoretical conceptions of interference with the functions of government,' were those in the Mountain Producers Case.

"The Mountain Producers Case (*Helvering v. Mountain Producers, supra*) was not decided on narrow, merely technical or presumptive grounds. Its very foundation was a repudiation of those insubstantial bases for securing broad private tax exemptions, unjustified by actual interfering or destructive effects upon the performance of obligations to or work for the government, state or national. The decision came as the result of experience and of observation of the constant widening of the exempting process from tax to tax to tax.

"Since that decision, as we have noted, the process has been reversed in direction. True intergovernmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption."

Van Brocklin v. Tennessee is an example of the type of case, now discredited, which took Chief Marshall's rhetoric literally.

In 1958, this Court decided the *Michigan* cases [1] which hold that local authorities may impose nondiscriminatory taxes on the interests of private persons in federal property which is what Pennsylvania law requires Appellants to do in the instant case. More recently this Court decided

1. *United States v. Detroit*, 355 U. S. 466, 2 L. Ed. 2nd 424; *United States v. Township of Muskegon*, 355 U. S. 484, 2 L. Ed. 2nd 436; *City of Detroit v. Murray Corporation*, 355 U. S. 489, 2 L. Ed. 441.

the converse that a discriminatory tax on such interests may not be imposed (*Phillips Chemical Company v. Dumas Independent School District*, 4 L. Ed. 2nd 384, Feb. 23, 1960. If the Court will now lay to rest the hornbook notion that *McCulloch v. Maryland* prohibits any local tax whatever simply because bare legal title is in the United States, the law on this subject will enjoy a rare symmetry and a serious injustice to local taxing bodies will be removed.

A substantial question of constitutional law is presented by this Appeal and its determination will have far-reaching effects. If private persons may conduct private business for profit under the shield of the United States' immunity from local tax, then a serious loss of tax revenues for local authorities will result which is completely unwarranted by any need of the Federal government for protection in its legitimate functions.

Relief.

Wherefore, Appellants submit that jurisdiction should be noted by the Court and the motion by Appellee to affirm be denied.

Respectfully submitted,

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